Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

MAHLON W. NEWKIRK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT COURT CONFLICTS WITH THE OPINION IN *FREE-SPEECH COALITION v. RENO*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom., ASHCROFT v. FREE-SPEECH COALITION*, 121 S.Ct. 876 (2001)?

PARTIES TO THE PROCEEDING

Petitioner is Mahlon W. Newkirk, was the defendant in a criminal prosecution in the trial court and the Appellant in the Eleventh Circuit Court of Appeals.

Respondent is the United States of America which was the Plaintiff/prosecution in the trial court and was the Appellee in the Eleventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The Eleventh Circuit Opinion (Appendix A) is an unpublished opinion of the Eleventh Circuit Court of Appeals, Case No.: 00-15812. The district court opinion (Appendix B) was entered on May 26, 2000.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on March 30, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution. The First Amendment states in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech. . . . "

STATEMENT OF THE CASE

On April 19, 2000, the Grand Jury issued a one count indictment charging defendant, Mahlon W. Newkirk, with knowingly receiving child pornography in violation of the 18 USC §§ 2252A(a)(2) and 2252A(b)(1). On April 24, 2000, the Defendant appeared for First Appearance and was Ordered released on pretrial release.

On May 15, 2000, the Defendant filed a Motion to Declare the Child Pornography Protection Act of 1996 (CPPA) unconstitutional. On May 16, 2000, the Defendant filed a Motion to Dismiss the Indictment for Denial of Due Process and Equal Protection of the Laws by the government charging him with receiving child pornography instead of possession of child pornography. Both motions were denied by the Court.

On June 1, 2000, Defendant entered a plea of guilty to the indictment and reserved the right to appeal the denial of his pretrial motions. On August 14, 2000, the Defendant filed a Motion to withdraw his plea of guilty to file a motion to dismiss the indictment for outrageous government misconduct by entrapping him as a matter of law.

On September 15, 2000, the Court allowed the defendant to withdraw his guilty plea, but denied the motion to dismiss the indictment for government misconduct. The Defendant then moved in open court to reinstate his guilty plea, and reserved the right to appeal the denial of all pretrial motions.

On October 18, 2000, Defendant was sentenced to a term of sixteen (16) months to the custody of Bureau of Prisons and three (3) years supervised release.

On October 27, 2000, Defendant filed a timely Notice of Appeal. Defendant moved for release pending appeal, which was granted by the Court. Defendant appealed to the Eleventh Circuit Court of Appeals. His conviction was affirmed by the Eleventh Circuit relying upon their decision in *United States v. Acheson*, 195 F. 3d 645 (11th Cir. 1999).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *FREE-SPEECH COALITION v. RENO*.

The Eleventh Circuit held that the "appears to be" a minor language in the definition section of the CPPA is not unconstitutionally over-broad and vague. *United States v. Acheson*, 195 F.3d at 653 (11th Cir. 1999). The Ninth Circuit held that the "appears to be" a minor and "convey[s] the impression" that the material is a minor language of the CPPA is void for vagueness. *Free-Speech Coalition v. Reno*, 198 F.3d at 1095. The Ninth Circuit Court stated:

> The two phrases in question are highly subjective. There is no explicit standard as to what the phrases mean. The phrases provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor or whose

> impression that a minor is involved leads to criminal prosecution.

Id.

This Court should grant certiorari to review an apparent conflict between the Eleventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals. See *N.L.R.B. v. Metropolitian Life Insurance Company*, 380 U.S. 438, 85 S.Ct. 1061, 13 L. Ed. 2d 951 (1965).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15812
Non-Argument Calendar

D.C. Docket No. 00-00023-CR-001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAHLON W. NEWKIRK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(Filed March 30, 2001)

Before TJOFLAT, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The issue presented in this appeal is whether the Child Pornography Prevention Act of 1996 is constitutional? Because we answered that question in the affirmative in *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), we affirm the appellant's conviction.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 00-15812

District Court Docket No.
00-00023-CR-001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAHLON W. NEWKIRK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

JUDGMENT

(Filed March 30, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: March 30, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 3:00cr23

MAHLON W. NEWKIRK

_____/

ORDER

(Filed May 26, 2000)

Before the Court is the motion of defendant Mahlon W. Newkirk to declare the Child Pornograph Prevention Act of 1996 [18 U.S.C. §§ 2251 *et seq.*] ["the Act"] unconstitutional. (doc. 17)

Defendant has been charged in a single count indictment with knowingly receiving child pornography in violation of Title 18, United States Code, Sections 2252A(a)(2)(A) and 2252A(b)(1).[1] Section 2256(8) defines "child pornograph:"

> (8) "child pornography" means any visual depiction, including any photograph, film,

---

[1] Title 18, United States Code, Section 2252A(a)(2)(A) provides: "Any person who . . . knowingly receives or distributes . . . any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . . shall be punished as provided in subsection (b)."

video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(Emphasis added).

Defendant argues first that the phrases "appears to be . . . a minor engaging in sexually explicit conduct" and "conveys the impression . . . of a minor engaging in sexually explicit conduct" are vague and overbroad, and do not meet the requirements of the First Amendment. In addition, defendant asserts that the Act is unconstitutional because it criminalizes the generation of images of fictitious children engaged in imaginary sexual conduct. Defendant also maintains that the Act is an unconstitutional content-based restriction on speech.

The Eleventh Circuit has already considered the constitutionality of the Act. In *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), a case arising from this court, the Eleventh Circuit determined that the Act was not invalid, overbroad, or void for vagueness. The defendant in *Acheson* challenged the "appears to be" language on grounds of vagueness and overbreadth. *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999). The court held "[b]ecause the statute puts a reasonable person on notice as to what conduct is prohibited and provides adequate protection against arbitrary enforcement, [defendant's] vagueness challenge fails." *Id.* at 653. Although the defendant in *Acheson* did not specifically challenge the "conveys the impression" portion of the definition, the same rationale applies. Because a reasonable person is put on notice of what specifically is prohibited, the law of this circuit is that the statute is not unconstitutional.

Addressing the argument of prohibiting virtual images of children engaged in sexual conduct, the Eleventh Circuit noted:

> Congress recognized that new 'technologies make it possible to produce . . . visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.' Pedophiles often rely on child pornography to win over their victims. Virtual pornography is a powerful tool in pedophiles' arsenals as 'a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by

> viewing depictions of other children 'having fun' participating in such activity.'
>
> Nor only does virtual pornography serve this end as effectively as the real thing, it also whets the appetite of child molesters just as much as child pornography created through the use of real children. Thus, defining child pornography in a manner which captures images that 'appear to be' minors engaged in sexually explicit activity serves the two goals of the Act which are 'the elimination of child pornography and the protection of children from sexual exploitation.'

195 F.3d at 649 (internal citations omitted). Thus, defendant's argument must fail.

With respect to the general First Amendment argument, the *Acheson* court determined: "Child pornography is one type of unprotected speech." *Id.* at 649, *citing New York v. Ferber*, 458 U.S. 747, 763, 102 S.Ct. 3348, 3357, 73 L.Ed.2d 1113 (1982). The court held that the Act was a content-based restriction on speech which was narrowly drawn to serve a compelling governmental interest: "the prevention of sexual exploitation and abuse of children." *Id.* at 650 (internal citation omitted). Accordingly, as a facial challenge to the Act's validity under the First amendment, the defendant's challenge must fail.

CONCLUSION

For all of the above reasons, the motion of defendant Mahlon W. Newkirk to declare the Act unconstitutional is DENIED. (doc. 17)

DONE AND ORDERED this 26th day of May, 2000.

/s/ Roger Vinson
ROGER VINSON
Chief Judge

Supreme Court, U.S.
FILED
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No. 00-1936

In the Supreme Court of the United States

MAHLON W. NEWKIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the "appears to be" and the "conveys the impression" prohibitions in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violate the First Amendment.

In the Supreme Court of the United States

No. 00-1936

MAHLON W. NEWKIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 252 F.3d 1363 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2001. The petition for a writ of certiorari was filed on June 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Florida to one count of knowingly receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. V 1999).

Pet. App. 3. He reserved the right to appeal the district court's determination that the statute, as amended by the Child Pornography Protection Act of 1996 (CPPA), is constitutional. He was sentenced to 16 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. *Id.* at 1.

1. The United States Customs Service created an undercover website where individuals interested in receiving child pornography could obtain additional information by providing their names, addresses, and e-mail addresses. After petitioner requested information, Customs mailed a catalogue to him. Petitioner ordered a child pornography videotape "Family Sex," which the catalogue described as "Mommy & Daddy really teach this 12 year old about sex!" Gov't C.A. Br. 3-5.

A Customs agent posing as a Federal Express driver made a controlled delivery of the videotape to petitioner. Thereafter, pursuant to a search warrant, the videotape was recovered from petitioner's VCR. Agents also found depictions of minors engaged in sexually explicit conduct stored on petitioner's computer. Gov't C.A. Br. 5.

2. Petitioner was indicted on one count charging him with the knowing receipt of child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. V 1999). Child pornography is defined to include any visual depiction, including any computer or computer-generated image or picture, that is "or appears to be" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(B) (Supp. V 1999), or that is presented in a manner that "conveys the impression" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(D) (Supp. V 1999). Child pornography is also defined to include any visual depiction the production of which involves the

use of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(A) (Supp. V 1999), and any visual depiction that has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(C) (Supp. V 1999).

Petitioner moved to have the CPPA declared unconstitutional. He contended that the CPPA's "appears to be" and "conveys the impression" language rendered the statute vague and overbroad, in violation of the First Amendment. Gov't C.A. Br. 5-6. Petitioner did not assert that the material he possessed failed to depict actual children engaged in sexually explicit conduct. Relying on *United States* v. *Acheson*, 195 F.3d 645 (11th Cir. 1999), which upheld the constitutionality of the CPPA's "appears to be" provision, the district court denied the motion. Pet. App. 3-7. The district court explained that, while *Acheson* addressed only the constitutionality of the CPPA's "appears to be" provision, the "conveys the impression" provision was valid under "the same rationale." *Id.* at 5. Petitioner ultimately entered a conditional plea of guilty, reserving the right to challenge the constitutionality of the CPPA. Gov't C.A. Br. 2.

3. The court of appeals affirmed. Pet. App. 1. The court explained that it had previously upheld the constitutionality of the CPPA in *Acheson*, *supra*.

DISCUSSION

As petitioner points out (Pet. 3-4), there is a circuit conflict on the question whether the CPPA's "appears to be" and "conveys the impression" provisions, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violate the First Amendment. While petitioner's case was on appeal, this Court granted the government's petition for a writ of certiorari in *Ashcroft* v. *Free Speech Coali-*

tion, cert. granted, No. 00-795 (Jan. 22, 2001), to resolve that conflict. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ashcroft* v. *Free Speech Coalition*, cert. granted, No. 00-795 (Jan. 22, 2001), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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AUGUST 2001